

***United States Court of Appeals
for the Second Circuit***



APPENDIX

77-1418

In The
United States Court of Appeals
For The Second Circuit

UNITED STATES OF AMERICA,

Respondent,

-against-

MICHAEL TART AND DAVID CAMPBELL,

Appellants.

B
P/S
ORIGINAL

**JOINT APPENDICES FOR APPELLANTS
TART AND CAMPBELL**

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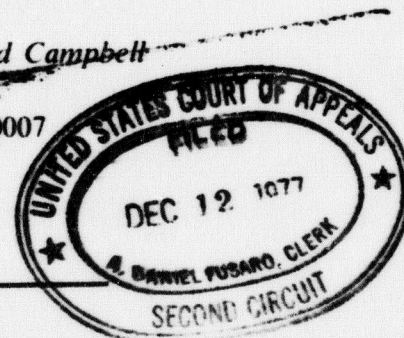
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APPENDICES

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JUDGE PIERCE'S DECISION DATED 9/16/77 DENYING APPELLANTS' MOTION TO SUPPRESS	A-7
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OFFENSE NO. ☐ JUDGE/MAGISTRATE Assigned U.S. vs. **TARTT, MICHAEL**
 OFFENSE NO. **0208 1 0851**
 MEANOR Mis ☐ Disposition
 FELONY Fel ☒ District Office (LAST, FIRST, MIDDLE)

Case Filed Mo. Day
04 14
 Not of File
 * **03**
 JUVENILE

77 0278 09

U.S. TITLE/SECTION

18:371
18:2113(a)
18:2113(d)

OFFENSES CHARGED

Consp. to commit bank robbery
Bank Robbery
Armed Bank Robbery

ORIGINAL COUNTS

1
2
3

U.S. MAG. CASE NO. **77-421**

ALL RELEASE

☐ AMI ☐ Fugitive
☐ Denied ☐ Bail ☐ PPS Recog
☐ PSA
 \$ **000** conditions
☐ Date ☐ 10% Deposit
☐ Surety Bond
☒ Bail Not Made ☐ Collateral
☐ Status Changed (See Docket) ☐ 3rd Ptry Cust ☐ Other

II. KEY DATES & INTERVALS

ARREST or

U.S. Custody Began
***4/4/77**
 Summons Served
 First Appearance

INDICTMENT

High Risk Date
4-14-77
 Information ☐
 Indict. Waived ☐
 In Charging District
 Superseding ☐
 Indict/Info ☐

ARRAIGNMENT

4-21-77
 Trial Set For
6-20-77
 1st Plea
4-21-77
 Final Plea
☐ NG ☐ G ☐ W/Drawn

TRIAL

Vol. Dir. ☐
 Trial Began ☐
7-18-77
 Trial Ended
7-27-77
☐ NG ☐ G ☐ W/Drawn

SENTENCE

Disposition of Charges
7-27-77
☒ Convicted ☐ On All Charges
☐ Acquitted ☐ On Lesser Offense(s)
☐ Dismissed ☐ WOP ☐ WP
☐ On Government's Motion

MAGISTRATE

Search Warrant Issued
 Return
 Summons Issued
 Served
 Arrest Warrant Issued
 COMPLAINT

DATE

4/5/77

INITIAL/NO.

HJR-08AD

INITIAL APPEARANCE DATE

4/5/77

PRELIMINARY EXAMINATION

☐ REMOVAL HEARING

☐ WAIVED ☒ NOT WAIVED

☐ INTERVENING INDICTMENT

Tape Number

INITIAL/NO.

HJR-08AD

OUTCOME:

☐ DISMISSED
☐ HELD FOR GJ OR OTHER PROCEEDING IN THIS DISTRICT
☐ HELD FOR GJ OR OTHER PROCEEDING IN DISTRICT BELOW

18 USC 2113(a) 2. - BANK ROBBERY

U.S. Attorney or Asst.

David C. Patterson
791-1920

ATTORNEYS

Defense ☐ CJA ☐ Ret. ☐ Waived ☐ Self ☐ None / Other ☐ PD ☐ CD

Howard L. Lasher
26 Court St., Brooklyn, N.Y. 11242
237-1387

* Show last names and suffix numbers of other defendants on same indictment/information

CAMPELL-01, Hall-02

DATE
4/5/77

(DOCUMENT NO.)

PROCEEDINGS

Complaint filed, Howard Lasher, 26 Court St., Bklyn, N.Y. assigned. Defendant remanded into the custody of U.S. Marshal in lieu of \$20,000 cash/surety
Indictment filed, 77 Cr. 278 Lasher, J.

4/14/77

4-21-77

Def't. (atty. present) Pleads not guilty. Def't. cont'd remanded in lieu of bail fixed in the amt. \$30,000. cash or surety. Case assigned to Pierce, J. Stewart, J.

4-25-77

Filed Notice of Appearance by Julius Wasserstein, 26 Court St., Bklyn, NY 11242 237 1387.

5-4-77

Issued Remand

5-3-77

Conference Held - All Dfts. present w/attys. Trial June 20, 1977 @9:30 - Room 1505. Bail reduction held as to dft. Tartt - Granted as follows: Bail reduced to \$10,000 FRB Sec. by 10% Cash (\$1,000). If Dft. makes bail he will be required to keep his atty. & AUSA Notified of his whereabouts. Dft. is restricted to New York City Limits.....Pierce J.

EXCLUDABLE DELAY

(a) (b) (c) (d)

DATE

IV. PROCEEDINGS (continued)

PAGE TWO

V. EXCLUDABLE DELAY

(DOCUMENT NO.)

1-4-77 Filed FRB in the Amount of \$10,000. Secured by \$1,000. Cash with the Clerk, US District Court, SDNY Receipt #086933, Co-Signed by Sheba Jones, 571 Academy St. NYC 10034.

3-27-77 Filed Dfts. Notice of Motion & supporting affdvt. for an order of severance & suppressing information, etc. Ret. 6/20/77

6-9-77 Filed Mag. Temp. Commitment dtd. 4-5-77.

6-13-77 Filed Govts. Memorandum in opposition to dfts. Tarbt's Motion to prohibit impeachment by prior convictions.

6-13-77 Filed Govts. Memorandum in opposition to dft. campell's motion for an order limiting the scope of cross examination of character witness.

6-13-77 Filed Govts. Memorandum in opposition to dft. Tartt's motion to compel add'l discovery.

6-13-77 Filed Govts. Memorandum in opposition to dft. Tartt's motion for a hearing into grand jury proceedings.

6-13-77 Filed Govts. Memorandum in opposition to dfts. motions to suppress evidence.

6-13-77 Filed Govts. Memorandum in opposition to dft. campbell's motion to dismiss the indictment.

6-16-77 Filed Govts. Requests for Voir Dire.

6-16-77 Filed Govts. Requests to Charge.

6-20-77 Suppression Hearing begun as to dfts. Campbell & Tartt.

6-21-77 Hearing Cont'd

6-22-77 Hearing Cont'd

6-23-77 Hearing Cont'd

6-24-77 Hearing Cont'd.

7-19-77 Deft's motion to suppress evidence is hereby denied..... Pierce, J.

8-4-77 Filed deft's affidavit in support of motion to suppress evidence.

8-4-77 Filed gov't requests for the Voir Dire

8-4-77 Filed gov't memo. in opposition to deft's motion to compel additional discovery.

8-4-77 Filed gov't memo. in opposition to deft's motion for a hearing into Grand Jury proceedings.

8-4-77 Filed gov't memo. in opposition to deft's motion to prohibit impeachment by prior convictions.

8-4-77 Filed government's supplemental request to charge

FINE AND RESTITUTION PAYMENTS

DATE	RECEIPT NUMBER	C.D. NUMBER	DATE	RECEIPT NUMBER	C.D. NUMBER

UNITED STATES DISTRICT COURT
CRIMINAL DOCKET

U. S. vs

TARTT, MICHAEL

77 278
Yr. Docket No.

DATE	PROCEEDINGS (continued)	V. EXCLUDABLE DE		
		(a)	(b)	(c)
	(Document No.)			
7-18-77	Trial begun as to defts Campbell & Tartt			
7-19-77	Trial cont'd			
7-21-77	"			
7-22-77	"			
7-25-77	"			
7-26-77	Trial cont'd court charges jury			
7-27-77	Trial cont'd and concluded. Jury finds deft. Tartt guilty on each of cts. 1,2& 3. PSI ordered. Sentence 9-19-77 at 4:30 P.M. Deft. is remanded until sentence.			
8-4-77	Filed order directing AUSA Lawrence Iason to submit to the Court, gov't exhibits 10A-D, to be considered along with other materials submitted in preparation for sentencing of the deft....Pierce, J.			
8-24-77	<i>Filed Transcript of record of proceedings, dated 7-18, 19-21, 22, 25, 26-77</i>			
9-20-77	Filed Notice of Appeal from a decision on motion to suppress evidence filed on 9-16-77. (copies issued, copies mailed)			
9-20-77	Filed Opinion #46384.... on deft's motion for an order to suppress evidence, Motion denied. Court finds that the warrantless entries in the deft's apt. to effectuate the arrest in question were not invalid for failure to the officers to obtain arrest warrant. The Court finds the searches to have indicment incident to lawful arrests and to be valid and admissible... Pierce, J. m/n			
9-26-77	Filed Judgment and Commitment, atty. (Julius Wasserstein) present. The deft. is hereby committed to the custody of the Atty. General or his authorized representative for imprisonment for a period of Five (5) Years on Ct. 1, Ten (10) Years on Ct. 3. Sentences imposed on cts. 1 and 3 are to run concurrently with each other. Count 2 is merged with count 3 for purpose of sentence as a necessarily included offense. Deft. is to receive credit for time served....Pierce, J. Issued Commitment 9-29-77.			
9-29-77	Filed Amended Notice of Appeal from judgment entered on 9-26-77.. (copies issued) (copies mailed)			
9-30-77	Filed true copy of J/C with marshal's return, deft. delivered to MCC on 9-26-77.			
10-25-77	Filed notice of certification and transmittal of 1st supplemental record to USCA.			
11-10-77	<i>Filed Transcript of record of proceedings, dated 6-20, 6-21, 6-22, 6-23, 6-24-77</i>			

AO 256A

A3

Interval (per Section 11) Start Date End Date Lit. Cnd.

Appendices

INDICTMENT

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

77 CRIM. 0278

UNITED STATES OF AMERICA

INDICTMENT

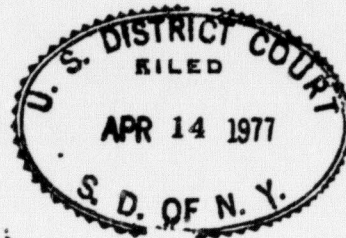
- v -

77 Cr. 278

DAVID CAMPBELL, WALLACE HALL,
and MICHAEL TARTT,

Defendants.

COUNT ONE



The Grand Jury charges:

From on or about March 15, 1977, up to and including April 4, 1977, in the Southern District of New York, the defendants, DAVID CAMPBELL, WALLACE HALL and MICHAEL TARTT, unlawfully, wilfully and knowingly did conspire, confederate and agree with each other and with others to the Grand Jury unknown to commit offenses against the United States in violation of Sections 2113(a) and 2113(d) of Title 18, United States Code.

1. It was part of said conspiracy that the defendants, DAVID CAMPBELL, WALLACE HALL and MICHAEL TARTT would and did unlawfully, wilfully and knowingly, by force and violence, and by intimidation, take and attempt to take from the person and presence of others money belonging to and in the care, custody, control, management and possession of the Chemical Bank, 543 Cathedral Parkway, New York, New York, a bank the deposits of which were then insured by the Federal Deposit Insurance Corporation.

2. It was further part of said conspiracy that the defendants, DAVID CAMPBELL, WALLACE HALL and MICHAEL TARTT, in committing and attempting to commit the offense described in paragraph 1 above, would and did unlawfully, wilfully and knowingly assault persons and put in jeopardy the lives of persons by the use of dangerous weapons and devices, to wit: a revolver and a shotgun.

OVERT ACTS

In furtherance of the conspiracy and to effect the objects thereof, the following overt acts, among others, were committed in the Southern District of New York:

1. On or about April 4, 1977, DAVID CAMPBELL, the defendant, entered the Chemical Bank, 543 Cathedral Parkway, New York, New York, and threatened persons therein with a shotgun;

2. On or about April 4, 1977, WALLACE HALL, the defendant, entered the aforesaid bank and threatened persons therein with a revolver;

3. On or about April 4, 1977, MICHAEL TARTT, the defendant, entered the aforesaid bank and with the aid of defendants DAVID CAMPBELL and WALLACE HALL, stole approximately \$19,184.

(Title 18, United States Code, Section 371.)

COUNT TWO

The Grand Jury further charges:

On or about April 4, 1977, in the Southern District of New York, DAVID CAMPBELL, WALLACE HALL, and MICHAEL TARTT, the defendants, unlawfully, wilfully and knowingly, by force and violence and by intimidation, did take and attempt to take from the person and presence of others money belonging to and in the care, custody, control, management and possession of the Chemical Bank, 543 Cathedral Parkway, New York, New York, a bank the deposits of which were then insured by the Federal Deposit Insurance Corporation.

(Title 18, United States Code, Sections 2113(a) and 2.)

COUNT THREE

The Grand Jury further charges:

On or about April 4, 1977, In the Southern District of New York, DAVID CAMPBELL, WALLACE HALL and MICHAEL TARTT, the defendants, in committing and attempting to commit the offense described in COUNT TWO above, unlawfully, wilfully, and knowingly did assault persons and put in jeopardy the lives of persons by the use of dangerous weapons and devices, to wit: a revolver and a shotgun.

(Title 18, United States Code, Sections 2113(d) and 2.)

Leo Agostini
FOREMAN

Robert B. Fiske, Jr.
ROBERT B. FISKE, JR.
United States Attorney

*Judge Pierce's decision of 9/16/77
denying motion to suppress*

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

-----X

UNITED STATES OF AMERICA :

- v - :

77 Cr. 278

DAVID CAMPBELL and MICHAEL TARTT, :

Defendants. :

-----X

APPEARANCES:

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Brooklyn, New York 11242

Attorney for Defendant Tartt

LAWRENCE W. PIERCE, D.J.

OPINION

The defendants, David Campbell and Michael Tartt, have moved pursuant to Rule 12(b) Fed.R.Crim.P. for an order of this Court suppressing certain evidence and statements allegedly obtained in violation of their constitutional rights. For the reasons stated herein, the motion is denied.

1. THE FACTS

On or about April 4, 1977, at approximately 10:30 a.m., the Chemical Bank, located at 543 Cathedral Parkway in the Borough of Manhattan, New York City, was robbed by three black men; one armed with a sawed-off shotgun, and another armed with a .32 caliber handgun. A silent alarm brought the police to the scene and within one-half hour, 11:00 a.m., a suspect was apprehended.

The suspect, Wallace Hall, who was found to be in possession of a .32/^{caliber}handgun, was apprehended in a subway station near the bank. He was then taken to the bank where he was identified by eye-witnesses as being one of the perpetrators of the crime and thereafter was taken to the 26th precinct station house where he was interrogated by Detective John Stein of the New York City Police Department. According to Det. Stein's testimony, during the interrogation, which took place between 1:00 p.m. and 2:00 p.m., Hall confessed to having participated in the robbery and he described the other alleged perpetrators as being two, tall, black males, known to him as "Dave" and "Mike". Hall stated that "Dave" wore his hair in a large, bushy "Afro" style and that "Mike" wore thick eyeglasses. Hall also stated that they probably would be found in either "Dave's" apartment located in the basement of a building on Post Avenue and Academy Street in Manhattan, or in "Mike's" apartment, #4B, located in the same apartment building at 579 Academy Street. Hall

told Stein that a blue carpet led to the entrance of Dave's apartment.

Contemporaneous with the interrogation of Hall, Special Agent Joseph Martinolich of the F.B.I. was assigned to the investigation as case-agent. This agent received much of the information obtained from Hall by 1:00 p.m. and additional information at about 3:00 p.m. As the agent in charge of the case, Martinolich was responsible for obtaining any warrants.

Between 2:00 and 4:00 p.m., Martinolich waited for the development of bank surveillance pictures for whatever further information they might provide before making the arrests of Dave and Mike.^{1/} According to his testimony, he made this decision based upon: the inconclusive nature of Hall's identification of his accomplices, a discrepancy in Hall's statement with respect to the location of the apartments described as belonging to the accomplices,^{2/} and a desire to protect the public from unnecessary danger which could have resulted from police action based upon erroneous information.

At approximately 3:00 p.m., Martinolich and other agents and police officers assigned to the case met at the Fort Tryon Restaurant, located in the area encompassing the 34th precinct and not too far from the Academy Street building, to discuss matters concerning the case. A few of the agents and officers ate lunch during this meeting, after

which, Detectives Stein, Cannon, and Hallahan proceeded to the Academy and Post address to verify the fact that there was a residential building there. A second trip was made to that address by Det. Stein between 5:15 and 5:30 p.m. At that time, Stein entered the building to determine the location of the apartments and to further verify Hall's description of the building and the apartments.

At approximately 4:00 p.m., Agent Martinolich went to F.B.I. headquarters to interview Hall. Martinolich testified that he specifically wanted to clarify the apparent inconsistency regarding the location of the two apartments. Martinolich also stated that Hall told him that his accomplices probably did not yet know of his arrest.

At 4:15 p.m., Martinolich telephoned the United States Attorney's Office and received "authorization" for the arrest of "Dave" and "Mike" from Barry Kingham, the Assistant United States Attorney assigned to "presentation".^{3/} (Tr. 183).

After the surveillance photos were developed and picked up from the processing facility in Long Island City, Martinolich and the other agents and police officers devised an arrest plan at a meeting at the 34th precinct station house which was carried out at approximately 6:00 p.m. The warrantless entries into each apartment were made contemporaneously by two teams of officers; each team was instructed

that the two men sought were believed to have participated that day in an armed bank robbery in which a sawed-off shotgun and a handgun were brandished.

a. The Campbell Arrest

Special Agents Higgins, Vogt and Carbone and Det. Miele made the arrest of "Dave", defendant David Campbell. According to Agent Higgins' testimony, they knocked on the door to the apartment allegedly belonging to "Dave", asked the person/ if he were "Dave" and upon receiving an affirmative response, entered the apartment, arrested and searched him. During the course of this arrest, Campbell, was read his Miranda rights. The agents and officers then proceeded to the living room where three other persons were located. According to Det. Miele, while securing one of these persons, he noticed a black airline bag near this person. Believing the bag might contain a weapon, Miele seized and searched it, finding \$10,000 in U.S. currency.

Campbell was asked by the agents for permission to search the entire apartment to which he responded, "You're going to do it anyhow, so it don't matter." (Tr. 609). The agents and officers thereafter searched the bedroom where a brown coat and white ski cap were seized, and also a sawed-off shotgun and shells which were found in a padlocked nightstand, the key to which was supplied, at Campbell's request, by one of the other occupants. During a later body search of Campbell, two .32 caliber shells were found in the jacket he was wearing.

b. The Tartt Arrest

Special Agents Martinolich and Carman, and Detectives Stein and Stiasny arrested "Mike", defendant Michael Tartt. According to the testimony of Det. Stein, the agents and officers first knocked on the door, identified themselves and after hearing what sounded like the cover of a peephole opening and closing and footsteps inside the apartment, forcibly entered and proceeded to the bedroom where defendant Tartt was found lying on the bed. He was arrested at gunpoint, searched and held "spread-eagled" on the bed. Found to have been hiding in the closet in the bedroom were Ms. Sheba Jones, Tartt's wife, and their child. Although there is agreement in the testimony that Tartt began to regurgitate at this point, it was the testimony of Ms. Jones that it was caused when the police kicked Tartt in his groin. This was denied by the arresting officers.^{4/}

Martinolich testified that he seized a pair of pants and a coat both lying in sight on a chair next to Tartt and that Agent Carman seized \$800 wrapped in tin-foil lying on top of a bed in the living room.^{5/} Tartt was advised of his rights in his apartment, at the 26th precinct station house, and again at F.B.I. headquarters. Although he refused to sign a waiver form and allegedly requested an attorney, he is said to have made certain statements.

2. THE ISSUE

The defendants contend that the arrests were invalid due to the failure of the agents to obtain an arrest warrant and that therefore the "fruits" seized incident to the searches pursuant to the unlawful arrests--the airline bag and \$10,000 found in the Campbell apartment and the \$800 and clothing seized from the Tarrt apartment--are inadmissible and should be suppressed. The defendants further contend that the search and seizure of the other items found in the Campbell apartment do not fall within any of the recognized exceptions to the search warrant requirement and are therefore similarly inadmissible and should be suppressed. Finally, the defendants contend that all statements made by them were made in violation of their Miranda rights and are therefore inadmissible.

The government asserts two grounds upon which it seeks to validate the warrantless arrests and searches incident thereto. First, the government asserts that since the agents had probable cause there was no need for an arrest warrant. Secondly, the government contends that an arrest warrant was not required in this case because of "exigent circumstances." As such, the government argues the searches incident to the lawful arrests were valid and thus all fruits obtained therefrom are admissible. The government also asserts that defendant Campbell consented to the search of his apartment and therefore all evidence seized pursuant to

this search is admissible, or in the alternative, that the clothing items were seized pursuant to the "plain view" doctrine and the airline bag and currency were seized pursuant to Terry v. Ohio, 392 U.S. 1 (1963) and are therefore admissible. With respect to the Tarrt seizures, the government similarly asserts that the clothing items were seized in "plain view" and that the \$800 was seized pursuant to the principles enunciated in Warden v. Hayden, 387 U.S. 294 (1967). Finally, the government asserts that the defendants validly waived their rights under Miranda and thus any statements made by them are admissible.

3. DISCUSSION

The first ground upon which the government seeks to validate the warrantless arrests presents the broad and as yet, unresolved issue of "whether and under what circumstances an officer may enter a suspect's home to make a warrantless arrest". U.S. v. Watson, 423 U.S. 411, 433 (1976) (Stewart, J. concurring). See also Gerstein v. Pugh, 420 U.S. 103, 113 n.13 (1975) and Coolidge v. New Hampshire, 403 U.S. 443, 480-481 (1971). This circuit, has yet to delineate the boundaries of permissible warrantless interventions into private dwellings, nevertheless it has addressed the issue in Titus v. United States, 445 F.2d 577 (2d Cir. 1971) (Friendly, J.) sufficiently to determine the legality of the warrantless entrances presented by the facts of the instant case.

The facts of Titus are quite similar to those presented here. A bank robbery was committed on December 19, 1969 at approximately 5:00 p.m. by two men wearing army fatigue jackets; one man armed with a sawed-off shotgun. The police received detailed descriptions of the perpetrators from tellers and customers shortly after the robbery was committed. A few days later, the F.B.I. was notified by an informant that Lloyd Neville and Harry Titus were the perpetrators.

The relevant events in Titus occurred on December 23rd. Between 3:00 and 4:00 p.m. on that date, the agents obtained a positive identification of Neville and a tentative identification of Titus as being perpetrators of the robbery. Between 8:30 and 9:00 that night, agents obtained and executed a warrant for the arrest of Neville. Shortly after midnight, Neville confessed to the robbery and identified Titus as his accomplice. Neville also gave the agents the address of Titus' girlfriend as the probable location of Titus and told them that he did not think that Titus was aware of his arrest.

At approximately 1:30 a.m., the police made a warrantless arrest of Titus in the girlfriend's apartment. During the course of the arrest, the police seized an army fatigue jacket, a quantity of money and several money wrappers bearing the name of the bank which had been robbed.

The Second Circuit rejected the defendant's argument that the police were required to obtain an arrest

warrant prior to effectuating Titus' arrest. While acknowledging that a forceful nighttime entry into a dwelling to execute a warrantless arrest where it appears that there was time to obtain a warrant would raise "a grave constitutional question", the Court concluded that an arrest warrant was not required in Titus since "sufficient reason appear[ed] why an arrest warrant could not have been sought without reasonable risk [of flight of the suspect]." Titus at 578, quoting, Jones v. United States, 357 U.S. 493 (1958). In making this determination, the Court not only considered the time required to have obtained a warrant, but also the fact that the agents and officers had evidenced their "respect for the [Fourth] Amendment" by obtaining an arrest warrant for the accomplice, Neville, and by making the specific determination that there was insufficient time to obtain an arrest warrant. Accord, Dorman v. United States, 435 F.2d 385 (D.C. Cir. 1970) and Vance v. North Carolina, 432 F.2d 984 (4th Cir. 1970).

Since the case at bar involves daytime entries into private dwellings, the Titus holding and rationale which relate to a nighttime entry are, a fortiori, applicable here.^{6/} Consequently, in viewing this case in light of Titus, the exigency of the circumstances and the reasonableness of the warrantless entries and arrest are placed in sharp focus by the two hour delay between the time the agents here had the first names, descriptions and locations of the alleged accomplices from reliable sources -- ostensible probable cause

to obtain an arrest warrant or to effectuate a warrantless arrest, and the time the call was made to the United States Attorney's office for authorization to arrest. See infra at 13. See also, United States v. Burke, 517 F.2d 377, 380 (2d Cir. 1975) and United States v. Miley, 513 F.2d 1191, 1204 (2d Cir. 1975), cert. denied, 423 U.S. 842 (1975). The Titus court, as well as other courts addressing the issue presented here, underscored the attempts of the agents and officers to obtain an arrest warrant as being important in assessing the exigency of the circumstances and the reasonableness of the entry. See Titus, supra, at 579; Dorman v. United States, supra, at 392 and Vance v. North Carolina, supra, at 991.

The defendants point to the two hour delay as evidence of the absence of "exigent circumstances" and thus, the inapplicability of Titus. They support this assertion with the agents' and officers' testimony regarding the time taken to eat lunch. They argue that even if "exigent circumstances" (here, risk of flight) were found to exist, these circumstances came about by virtue of the agents' and officers' dilatory actions and their desire to "make the case" and that the government should not now be allowed to justify the warrantless arrests based on "exigent circumstances" which the agents and officers themselves created. See Dorman, supra, at 393. Moreover, the defendants point to the testimony of Agent Martinolich regarding his complete failure to even consider obtaining an arrest warrant

as being evidence of a lack of respect for the Fourth Amendment. (Tr. 257); see Titus, supra, at 579.

The government and officers assert that the delay was caused by effective law enforcement, i.e., the need to corroborate an inconclusive statement by Hall as to the defendants' whereabouts, motivated by the desire to avoid possible mistakes by taking police action based upon inaccurate "leads".

Given the arguments presented by both sides, the resolution of this motion depends upon the Court's determination of whether the actions of the agents and officers and any resulting delay, stemmed from effective, intelligent, law enforcement through steady, systematic identification and pursuit of criminal suspects or from dilatory actions and/or a desire to "make a case" at the risk of violating the constitutional rights of the suspects. See United States v. Carrier, 541 F.2d 545, 553 (6th Cir. 1976) and United States v. Harris, 321 F.2d 739 (6th Cir. 1963).

In making this determination, the Court has considered the concerns for public safety as expressed by Agent Martinolich; his uncontroverted testimony that it takes four to five hours to obtain an arrest warrant in the Southern District of New York; the eventual pre-arrest call to the United States Attorney's Office; and the demeanors of the agents and officers as they testified regarding their assessments of the strengths and weaknesses of the case. (Tr. 358, 359). In so doing,

the Court cannot say that the two hour time span constituted dilatory tactics by the agents and the officers or that an otherwise proper course of police action was converted by this time factor into a violation of the constitutional rights of the suspects. To find otherwise would be to substitute this Court's judgment, from the vantage point of hindsight, for the experience and skill exhibited by the agents and officers here. See Titus, supra, at 579. See also, United States v. Monticelli, 526 F.2d 1008, 1010 n.1 (2d Cir. 1975). Moreover, the Court understands the system of "presentations", as described in the testimony regarding the procedure of the United States Attorney in this district, to be an effort to act responsible in making legal assessments of probable cause and of the necessity for an arrest warrant by law enforcement agents. Therefore, the Court does not find Martinolich failed to consider the necessity for obtaining a warrant or that he evidenced a lack of respect for the Fourth Amendment. To the contrary, the agent's reliance on the Assistant United States Attorney assigned to presentations to assess the necessity for a warrant was an attempt to comply with the requirements of the Fourth Amendment, akin to the assessment made by the officers in Titus regarding their inability to obtain a warrant.

Therefore, once the statements of Hall were corroborated and the advice to proceed to arrest was given by the United States Attorney's office, it became necessary for the agents and officers to "spring into action" to prevent

further delay and to reduce the risk of flight of the suspects. Another four or five hours to obtain an arrest warrant could have totally thwarted the apprehension of the remaining suspects. See United States v. Mapp, 476 F.2d 67, 74 (2d Cir. 1973).

Accordingly, the Court finds that the warrantless entries into the defendants' apartments to effectuate the arrests in question were not invalid for failure of the officers to obtain arrest warrants.^{7/} The Court finds the searches to have been incident to lawful arrests and to be valid and thus the fruits thereof are admissible: the .32 caliber cartridges found on Campbell's person and the \$10,000 found in Campbell's apartment (see United States v. Vigo, 487 F.2d 295 (2d Cir. 1973); and the \$800 found in Tarrt's apartment. See Warden v. Hayden, 387 U.S. 294 (1967) and Coolidge v. New Hampshire, 403 U.S. 443 (1971). Since the officers were permissibly in the apartments, items seized in plain view are admissible: the coat and pants seized in Tarrt's apartment. See Coolidge v. New Hampshire, supra. Further, the Court finds that the defendant Campbell voluntarily consented to the search of his apartment and to the padlocked nightstand. See Bumper v. North Carolina, 391 U.S. 543 (1968). Therefore the coat and hat seized and the shotgun and shells found in the nightstand are admissible. Finally, the Court finds that the defendants were informed of their rights as required by Miranda v. Arizona, 384 U.S. 436 (1966) and

that therefore any statements made by the defendants constituted a valid waiver of these rights. See United States v. Boston, 508 F.2d 1171 (2d Cir. 1974), cert. denied, 421 U.S. 1001 (1975). The statements subject to this motion are therefore admissible.

Accordingly, the motions to suppress are hereby denied.

SO ORDERED.

Dated: New York, New York
September 16, 1977

LAWRENCE W. PIERCE
U. S. D. J.

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FOOTNOTES

1. Prior to obtaining an arrest warrant, the procedure called for the agents first to obtain approval from the United States Attorney's office. See note 3, infra.
2. Apparently, Hall had told agents that both "Dave" and "Mike" lived at 579 Academy Street. However, according to F.B.I. sources, there was no apartment #4B at that address. (Tr. 163).
3. The Assistant United States Attorney makes a legal judgment as to whether or not an arrest should be made and whether or not a warrant should be obtained.
4. See Footnote 5, infra.
5. Ms. Jones testified that the apartment was ransacked and that the \$800 was found in an enclosed headboard attached to a bed in the living room. However, given the inconsistencies in her testimony regarding pictures taken of an allegedly ransacked closet, her demeanor while testifying and all of the evidence presented, the Court does not find any of her testimony to be credible.
6. There appears to be some support for the proposition that a warrantless daytime arrest in a private dwelling is valid notwithstanding the fact that officers may have had time to obtain a warrant. See United States v. Hall, 348 F.2d 837, 841 (2d Cir. 1965) (Friendly, J.). See also United States v. Fernandez, 480 F.2d 726, 740 n.20 (2d Cir. 1973) (Friendly, J.). Cf. United States v. Watson, supra, at 418 n.6

The law has consistently treated the issuance of arrest and search warrants to be excused at night differently from those to be executed during the day. Although the arrests in the case at bar were executed at dusk, which the parties stipulated to be daytime, it could be argued that the factors requiring different treatment between the execution of day and night warrants are present at dusk. Cf. United States v. Hall, supra; United States v. Watson, supra; Vance v. North Carolina, supra, at 991 n.1.; and Rule 41(c) Fed.R.Crim.P. This is particularly true when forcible entry is made. Titus, supra, at 578.
7. See United States v. Mapp, 476 F.2d 57, 74-75 (2d Cir. 1973). See also, Ker v. California, 374 U.S. 23 (1963).

CHARGE OF THE COURT

Judge Pierce

THE COURT: Counsel, Madam Forelady,
ladies and gentlemen of the jury:

First of all, let me thank all of you for
your punctuality and for following my instructions during
the course of this trial.

We all know that by serving on this jury
you have made an important contribution to the administra-
tion of justice. We could not proceed to undertake to
administer justice without you, so we thank you for the
sacrifices that you make in order to make it possible for
this to occur.

I also wish to thank the attorneys for their
cooperation during the trial. They have represented
their respective positions with dedication and with
professional skill.

I ask you now to give me the same degree
of attention that you had given thus far so that you
might understand the principles of law which are applicable
in this case.

Now, you must keep in mind that I am not
about to engage in a social conversation. I am about to

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2 instruct you as to the law. So, when you hear me enunciating
3 legal principles, you should not be surprised that they
4 are legal.

5 Consequently, they require your most careful
6 attention because you are not lawyers. We know that.
7 We know that that is so. But I inform you that every
8 week throughout courthouses, courtrooms, rather, in this
9 courthouse, juries wrestle with difficult and sometimes
10 complex legal principles, just as you are about to. If
11 they can do it, you can do it. So, just pay careful
12 attention to me.

13 I will be repeating much of what I say
14 more than once and if you wish at any point once you
15 begin your deliberations to have any part of this charge
16 reread, you have but to send out a note and make that
17 request. We will read it back to you as often as you
18 wish to hear it.

19 First, I want to point out some general
20 principles as to your duty. As to what you may and may
21 not consider during your deliberations.

22 As you have heard me say before, it is my
23 function as the Judge to instruct you as to the law which
24 is applicable in this case. It is your duty to accept the
25 law as I state it to you and it is your duty to apply the

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1 law to the facts as you find those facts to be during your
2 deliberations. I ask you not to single out any one
3 instruction alone as stating the law but rather to consider
4 the instruction as a whole and the logical result of your
5 application of the law to the facts in this case, as you
6 find those facts to be, should be a verdict, a verdict
7 of guilty or not guilty as to each defendant, as to each
8 count.
9

10 Now, you are the sole and exclusive judges
11 of what the facts are in this case. It is you who must
12 pass upon the weight of the evidence and the credibility
13 of the witnesses. It is you who must resolve conflicts
14 as there may be in the evidence and you must draw such
15 reasonable inferences as may be warranted by the testimony,
16 stipulations and exhibits in this case. In other words,
17 from the evidence.

18 With respect to any matters of fact, it is
19 your recollection and yours alone which governs. Anything
20 which the attorney for the government or the attorneys for
21 the defendants have said with respect to any matters in
22 evidence or as to any factual matters is not to be
23 substituted for your own independent recollection of the
24 evidence or of the facts in this case. And anything
25 which I have said with respect to any matters in evidence

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or as to any factual matters is not to be taken in lieu of your own recollection.

You are not to assume that I have any opinion as to whether or not either of the defendants is guilty or not guilty. Or as to the truth or falsity of the charges asserted in the indictment. The fact that I have asked questions, denied or granted motions during the course of this trial is not to be taken by you as an indication that either of the defendants is believed by the Court to be guilty or not guilty.

Further, counsel have the right on the offer of certain evidence to press legal objections. In doing so, they are simply performing their duty.

Now, in your deliberations to determine the facts on whether the government has established the elements of the crimes charged -- and you are going to hear more from me as to what those elements are -- you are to consider solely the testimony which you have heard from the witnesses, any stipulations of fact the attorneys have agreed upon, the exhibits which have actually been received in evidence and even any lack of material evidence, but nothing else.

That constitutes the evidence in the case.
That constitutes what you may consider in your deliberations.

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2 I told you earlier that certain evidence
3 was being received subject to connection. And I have
4 told you that I have found that that evidence has been
5 connected and thus may be considered by you along with
6 all the other evidence in the case. Please remember
7 that this ruling does not in any way represent a finding
8 by the Court as to what the facts are. That determination
9 has to be made by you, the jury. I have simply ruled
10 that the evidence in question may be considered by you as
11 you perform your function of deciding what the facts are
12 here.

13 The indictment in this case names three
14 defendants, Wallace Hall, David Campbell and Michael Tartt.
15 Only two, David Campbell and Michael Tartt, are on trial
16 before you. Therefore, they are the only persons about
17 whom you must make a determination as to whether they are
18 guilty or not guilty as to each count.

19 Although, as I will explain to you shortly,
20 in making this determination you may have to determine
21 the nature of the participation, if any, of the other
22 defendant and alleged co-conspirator, Wallace Hall.

23 In making the determination of whether a
24 defendant is guilty or not guilty of the crimes charged,
25 you must bear in mind that guilt is personal and that this

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determination as to each defendant must be made separately with respect to each defendant, separately with respect to each count.

Now, as you approach the performance of your function in this case, that is, the determination of whether the defendants Tarrt and Campbell are guilty or not guilty, please remember that it is your duty to weigh the evidence as to each calmly and dispassionately, without sympathy or prejudice for or against any party here.

The fact that the government is a party here or that the prosecution occurs in the name of the United States of America, it entitles it to no greater consideration than that afforded to any other party here. And by the same token, it is entitled to no less consideration. All parties, government and individuals alike, stand equal before the law.

The defendants on trial here have pleaded not guilty to the charges in the indictment. Consequently, if the defendants are to be convicted, the government has the burden of proving each and every element of the crimes charged beyond a reasonable doubt. That burden never shifts. It remains upon the government throughout the trial. The law never imposes upon a defendant in a criminal case the burden of calling any witnesses or

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producing any evidence.

So, the question arises, what is a reasonable doubt? It is a doubt which a reasonable person has after carefully weighing all of the evidence. It is the kind of doubt which would make you hesitate to act in the most important affairs of your own life. Reasonable doubt is doubt which appeals to your reason, your judgment, your common sense and your experience. It is not caprice or whim or speculation. It is not an excuse to avoid the performance of an unpleasant duty. It is not sympathy for any party.

If, after a fair and impartial consideration of all of the evidence or lack of evidence, you can honestly say that you do not have an abiding belief as to the guilt of the defendant you are considering, then you have a reasonable doubt and it is your duty to acquit.

On the other hand, if after a fair and impartial consideration of all the evidence, you can honestly say that you do have an abiding belief as to the guilt of the defendant you are considering, then you have no reasonable doubt and it is your duty to convict.

A reasonable doubt does not mean positive certainty beyond all possible doubt. The law in a criminal case is that it is sufficient, if the guilt of a defendant

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is established beyond a reasonable doubt, not beyond all possible doubt.

The defendants are presumed to be not guilty of the accusations contained in the indictment. And this presumption continues throughout the trial and even during the course of your deliberations in the jury room. So, the presumption of innocence is sufficient to acquit a defendant of a crime charged unless it is overcome by evidence that satisfies your mind beyond a reasonable doubt of the guilt of the defendant you are considering after a careful and impartial consideration of all of the evidence in the case. Unless you are so satisfied, it is your sworn obligation to find that defendant not guilty. If you are so satisfied, it is your sworn obligation to find that defendant guilty.

From time to time you may have heard reference made to direct evidence and to circumstantial evidence. Let me explain the difference between the two.

Direct evidence is where a witness testified to what he saw, heard or observed. What the witness knows of his own knowledge. Something which comes to that witness by virtue of his senses. That is direct evidence.

Circumstantial evidence is evidence of facts and circumstances from which one may infer connected

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facts which reasonably follow in the common experience of mankind.

To state it somewhat differently, circumstantial evidence is a fact or a series of facts in evidence which have a logical tendency to lead the mind to a conclusion that another fact exists even though there is no direct evidence to that effect.

Let me give you a brief example.

If when you filed out of this courtroom during one of our recesses you could see that it was raining outside and all of the windows in the courtroom were closed and you saw that that was so and all of the window sills beneath the windows were dry and you saw that that was so and then after a ten or fifteen minute recess, you come back to the courtroom and you find that all the windows are still closed, but you see water on the window sills. You could conclude that someone had opened the windows while you were out of the courtroom and that rain had come into the courtroom and fallen upon those window sills.

Now, you would arrive at this conclusion from circumstantial evidence. In other words, you would infer on the basis of reason and experience and common sense from one or more established facts, the existence

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1 of some further fact. You would arrive at that conclusion
2 from circumstantial evidence. In other words, you would
3 infer on the basis of reason and experience from one or
4 more established facts the existence of some further
5 fact.
6

7 A conviction may not rest upon suspicious
8 circumstances alone. However, circumstantial evidence,
9 if believed, is of no less value than direct evidence.
10 For in either case you have to be convinced beyond a
11 reasonable doubt of the guilt of the defendant you are
12 considering.

13 Now, there are a number of factors which
14 are not evidence in this case in which you may not under
15 any circumstances consider during your deliberations.

16 First, if during the course of the trial
17 a question was asked and an objection was made and if I
18 sustained the objection, then you are to disregard the
19 question and any alleged facts contained in the question.
20 If there were an answer to the question, you are also to
21 disregard the answer.

22 Similarly, if I rule that an answer be
23 stricken from the record, you are to disregard the answer
24 and the question in your deliberations. They are not
25 evidence and therefore cannot be considered by you in any

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respect.

I instruct you that are you not to consider in any manner the testimony of the witness Robert C. Jones regarding marijuana on either the question of whether the defendants Tarrt and Campbell are guilty or not guilty or as bearing on the credibility of the witnesses including the defendants. This testimony has no bearing on any issue involved in this case.

I therefore instruct you to disregard it and it is stricken from the record, except that I am not striking that portion of Robert C. Jones' testimony in which he stated that he did have a key and access to the night stand and did go into the night stand although he did not do so on April 4, 1977.

Also, I told you at the beginning of this trial that an indictment is not evidence. It is simply a procedure by which persons accused by a grand jury of crimes are brought to trial. Whether the person accused or the persons accused are guilty or not guilty of the crimes charged is determined by a trial jury such as you are.

You have heard testimony by the defendant Tarrt that he ate breakfast with the defendant Campbell on April 4, 1977. You have heard testimony by Agent

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2 Martinolich that the defendant Tarrt told him he had not
3 eaten breakfast with Campbell that morning.

4 You must resolve any conflicts which you
5 find to exist regarding this matter in any event whatever
6 you determine. Any of Tarrt's statements to Agent
7 Martinolich about this matter may not be considered by
8 you in any respect against the defendant Campbell.

9 You, as jurors, are the sole judges of the
10 credibility of the witnesses and the weight their testimony
11 deserves. You know that there is no automatic way to
12 decide who is telling the truth and who is not. Credibility
13 can be equated with believability. If a witness is
14 credible, you say that witness is believable.

15 You should carefully scrutinize all the
16 testimony given, both on direct examination, cross
17 examination and otherwise. The circumstances under which
18 each witness has testified and every matter in evidence
19 which tends to show whether a witness is worthy of
20 belief. You should consider the witness' ability to
21 observe the matters as to which he or she has testified
22 and whether the witness impresses you as having had an
23 accurate recollection of these matters.

24 A witness may be discredited or impeached
25 by contradictory evidence or by evidence at other times

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that the witness made statements inconsistent with the witness' present testimony. If you believe that any witness has been impeached and thus discredited, it is within your exclusive province to give the testimony of said witness such credibility as you think it deserves. When judging credibility, consider any relation any witness may bear to any side of the case. Consider the manner in which each witness might be affected by the verdict and the extent to which, if at all, each witness is either supported or contradicted by other evidence in the case.

Moreover, if you find that any witness has wilfully testified falsely as to any material matter, you may reject the entire testimony of the witness or you may accept such portion of it as you believe to be true.

Wallace Hall, a witness called by the government, was convicted upon his plea of guilty previously entered to the crime of robbing the bank which is the subject of the charges against the defendants on trial here.

Upon Hall's own testimony here, if believed, he was an accomplice in the crimes charged against the defendants here. Please note that there is no requirement

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1 in the federal courts that the testimony of such an
2 accomplice be corroborated, but the testimony of such a
3 witness should be scrutinized with special care and caution.
4

5 Where a witness has been convicted of a
6 crime or has admitted criminal conduct, this may have a
7 bearing upon your consideration of the witness' credibility.
8 But it does not follow that the witness is not capable of
9 testifying truthfully. You must consider the interest or
10 motive any such witness may have in testifying

11 Hall, as you have heard, has not yet been
12 sentenced. You must therefore take this and any other
13 interest and motive you may find Hall to have in testify-
14 ing into consideration when assessing his credibility.

15 The testimony of a person who lies under
16 oath about a material fact should be considered with
17 caution and weighed with great care. You may recall
18 that Wallace Hall admitted in testimony that he had lied
19 during part of his testimony and also that he lied to
20 agents of the Federal Bureau of Investigation. You may
21 consider all of this in assessing that witness' credibility.

22 In the final analysis, with this witness
23 and with all witnesses, you must consider the person, that
24 is the witness, and the witness' demeanor, what the
25 witness said, how the witness said it and all the surrounding

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circumstances in passing upon the witness' credibility.

If you find that Hall's testimony was deliberately untruthful, you should reject it. On the other hand, if you find that he gave a truthful version of events, you should accept it and act accordingly.

As I previously instructed you, if you find his testimony truthful in part and false in part, you may reject it totally or you may reject only that part which you find to be false.

In this case, each of the defendants has taken the stand and testified. There is no obligation upon a defendant to testify as I have said. But when a defendant does take the stand and does testify, he is tested by all the same rules and guides that any other witness is tested by.

You know, of course, that a defendant is interested, vitally interested in the outcome of the case. And interest is a factor which you must take into consideration when assessing the testimony of any witness, whether presented by the government or the defense.

There has been evidence in this case of a prior conviction of the defendant Tarrt and several as to Hall. With reference to this, I charge you that evidence of a defendant's previous conviction is to be considered

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by you only insofar as it may affect the credibility or believability of the person as a witness.

Further, the nature of the prior crime is important in determining whether it affects credibility. It is crimes which involve fraud, false statements or similar dishonesty which may affect credibility. You may consider crimes such as these in assessing credibility. You may not in any way consider a prior conviction on the part of the defendant Tarrt as evidence of guilt of the crimes for which he is on trial here.

I instruct you that an attempt to conceal evidence by a defendant after a crime has been committed, if you find such occurred, while it is not sufficient alone to establish guilt, it may be considered by you along with all other evidence in the case in determining the presence or absence of consciousness of guilt.

You should also bear in mind that there is no duty upon either side to call a witness whose testimony would merely repeat testimony already in evidence or to offer evidence which would be merely cumulative of evidence already presented.

The weight of the evidence is not determined simply by the greater number of witnesses or the greater length of time taken by either side.

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2 In weighing the testimony of witnesses,
3 you must consider all the evidence in the case.

4 Counsel have elicited from certain witnesses
5 that they have spoken with an attorney in this case prior
6 to testifying. It is permissible for attorneys to
7 talk to witnesses before they testify and in preparation
8 for trial.

9 In regard to all the witnesses, the ultimate
10 question for you to decide in passing on the credibility
11 of the witness is, "Did the witness tell the truth before
12 you?" It is for you to say whether a witness' testimony
13 at this trial was truthful or untruthful in whole or in
14 part.

15 Now, that completes my general instructions
16 with regard to what your duty and function is and with
17 regard to what you may or may not consider in your
18 deliberations.

19 I am now going to turn to a discussion of the
20 specific charges against the defendants and instruct you
21 as to what the essential elements are which the government
22 must prove beyond a reasonable doubt in order to sustain
23 the charges against the defendants.

24 The indictment in this case contains three
25 counts. Each count charges a separate violation of federal

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law.

In the first count, each of the two defendants on trial here is charged with conspiring to rob a bank, the deposits of which are insured by the Federal Deposit Insurance Corporation.

In Counts 2 and 3, the defendants are charged respectively with committing what we call substantive violations of the federal statute which makes it unlawful to rob such a bank through the use of force, violence or intimidation and to assault or put in jeopardy the life of any person by the use of a weapon during the commission of the robbery charged.

Each count charges a separate crime. Each count must be considered by you separately and with reference to each count, in determining whether the defendant you are considering is guilty or not guilty, you are to consider only the evidence presented against that defendant.

Now, we are going to take Count 1 and discuss the elements.

First, I will read Count 1 to you from the indictment. A copy of this will be sent into the jury room so that you may have it during your deliberations.

Count 1, grand jury charges, from on or

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about March 15, 1977 up to and including April 4, 1977, in the Southern District of New York, the defendants, David Campbell, Wallace Hall and Michael Tartt, unlawfully, wilfully and knowingly, did conspire, confederate and agree with each other and with others to the grand jury unknown, to commit the offenses against the United States in violation of federal law.

Paragraph 1. It was part of said conspiracy that defendants, Campbell, Hall and Tartt, would and did unlawfully, wilfully and knowingly by force and violence and by intimidation, take and attempt to take from the person and presence of others, money belonging to and in the care, custody, control, management, possession of the Chemical Bank, 543 Cathedral Parkway, New York, New York, a bank the deposits of which were then insured by the Federal Deposit Insurance Corporation.

It was further a part of said conspiracy that the defendants in committing and attempting to commit the offense described in Paragraph 1 would and did unlawfully, wilfully and knowingly assault persons and put in jeopardy the lives of persons by the use of dangerous weapons and devices, to wit, a revolver and a shotgun.

Overt Acts. In furtherance of the conspiracy and to effect the objects thereof, the following

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overt acts among others were committed in the Southern District of New York. There are three.

One. On or about April 4, 1977, David Campbell, the defendant, entered the Chemical Bank, 543 Cathedral Parkway, New York, New York, and threatened persons therein with a shotgun.

Two. On or about April 4, 1977, Wallace Hall, the defendant, entered the aforesaid bank and threatened persons therein with a revolver.

Three. On or about April 4, 1977, Michael Tarrt, the defendant, entered the aforesaid bank and with the aid of defendants David Campbell and Wallace Hall, stole approximately \$19,184.00 in violation of federal law.

Now, what is a conspiracy?

A conspiracy is a collective criminal agreement, a partnership in crime. In order to prove the crime of conspiracy, which is alleged here, the government must establish to your satisfaction beyond a reasonable doubt each of the following essential elements of the crime of conspiracy. I am going to enumerate them first and then I am going to discuss each one of them.

First, the existence of the conspiracy, as alleged in the indictment.

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Second, that it was a purpose of the conspiracy, as alleged in the indictment, to rob a bank.

Third, that the defendant whose guilt you are considering knowingly and wilfully became a participant in or a member of the conspiracy.

And, fourth, that at least one of the co-conspirators knowingly committed at least one of the overt acts set forth in the indictment in furtherance of the conspiracy during the period of the conspiracy alleged in the indictment and in the Southern District of New York.

Let's discuss, first, the element which pertains to the existence of a conspiracy.

In order to establish or prove a conspiracy the government is not required to show that two or more persons sat around a table and entered into a solemn contract orally or in writing stating that they had formed a conspiracy to violate the law, setting forth the details of the plan, the means by which the unlawful project is to be carried out or the part to be played by each co-conspirator.

Indeed it would be extraordinary if there were such a formal agreement or specific oral statement. Your common sense would tell you that when people undertake

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2 to enter into a criminal conspiracy, each is left to
3 unexpressed understanding. From its very nature, a
4 conspiracy is almost invariably secret in its origin
5 and execution. Therefore, it is sufficient if you find
6 that two or more persons, in any manner, through any
7 contrivance impliedly or tacitly come to a common under-
8 standing to violate the law.

9 Express language or specific words are not
10 required to indicate assent or attachment to a conspiracy.
11 Nor is it required to find that all the co-conspirators
12 alleged in the indictment joined in the conspiracy in
13 order to find that a conspiracy existed. You need only
14 find that the defendant whose guilt you are considering
15 and one other person you find to be a co-conspirator
16 entered into an unlawful agreement in order to find that
17 a conspiracy existed.

18 In this connection, it is not necessary for
19 the government to prove the success of the venture in
20 order to establish a violation of the conspiracy statute.
21 A conspiracy is basically an agreement to violate the law.
22 It may exist even though final objectives are never
23 realized or accomplished.

24 In determining whether the conspiracy
25 charged here actually existed, you may consider the

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evidence, the acts and the conduct of the alleged co-conspirators as a whole and the reasonable inferences to be drawn from such evidence should be drawn.

If upon such consideration of the evidence you find beyond a reasonable doubt that the minds of at least two of the alleged co-conspirators met in an understanding way and that they agreed, as I have explained the conspiratorial agreement to you, to work together in furtherance of the unlawful scheme alleged in the indictment, then proof of the existence of a conspiracy but only of its existence is complete.

While the indictment charges that the conspiracy began on or about March 15, 1977 and continued until on or about April 4, 1977, it is not essential that the government prove the conspiracy started and ended on or about those particular dates.

It is sufficient if you find that in fact a conspiracy was formed and existed for some substantial period of time within that period. If you find that at least one of the overt acts alleged in the indictment was committed in furtherance of the conspiracy during that period and as to an overt act which you find occurred, you need not find that it occurred on a specific date set forth in the indictment. You need only find

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1
2 that it occurred during the approximate time period March
3 15, 1977 through April 4, 1977.

4 Let's move on to the second element of the
5 crime. The indictment charges that the objective of
6 the conspiracy was to violate the federal bank robbery
7 statute.

8 Now, with respect to this element, the
9 government must prove to your satisfaction beyond a reason-
10 able doubt that it was the purpose of this conspiracy
11 to violate that statute.

12 At the trial, the government has contended
13 that the real overall objective was to rob a bank. If
14 you find that the conspirators agreed upon this one
15 criminal objective, that is, to rob a bank, that would
16 be sufficient to satisfy this second element and you
17 must find that beyond a reasonable doubt.

18 As to the third element of the crime of
19 conspiracy, you must find that the defendants knowingly
20 and wilfully became members of the conspiracy.

21 Therefore, if you conclude that a conspiracy
22 as charged in the indictment did exist and that its
23 purpose was to violate the federal statute I have mentioned,
24 the bank robbery statute, you must next determine rather
25 that the defendants on trial were members of that conspiracy.

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That is, whether they participated in the conspiracy while it existed with knowledge of its unlawful purpose and in furtherance of its unlawful objectives.

A defendant's participation in the conspiracy like its existence can be inferred from such facts and circumstances in evidence as would logically sustain that inference.

I want to caution you, however, that mere association of a defendant to an alleged co-conspirator does not establish his participation in a conspiracy if you find one did exist.

So, too, the mere knowledge by a defendant of the existence of a conspiracy or any illegal act on the part of an alleged co-conspirator is not sufficient evidence to establish his membership in the conspiracy.

You must find, as I have said, actual knowing participation by the defendant in the agreement to violate the law.

An act is done knowingly if it is done voluntarily and purposefully and not because of a mistake, or an accident or due to mere negligence or for other innocent reasons. An act is done wilfully if it is done knowingly, deliberately and with an evil motive or intent or purpose.

A47

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2 In determining whether a defendant has
3 acted wilfully, it is not necessary for the government
4 to establish that the defendant you are considering knew
5 that he was breaking any particular law. It must, however,
6 prove that the defendant had an evil motive or purpose
7 in mind.

8 Let's stand and take a break here a moment.

9 MR. IASON: May we approach the side bar?

10 THE COURT: Yes.

11 (At the side bar)

12 THE COURT: Yes, sir.

13 MR. IASON: I wanted to bring to the
14 attention of the Court and counsel to Juror No. 11.
15 The Court had referred to him earlier during the trial.

16 THE COURT: I noticed he was dosing through
17 half of the charge. When we get to the end, we may have
18 to take some action about it.

19 MR. IASON: I wanted to bring it to the
20 Court's attention.

21 THE COURT: He was not paying attention
22 and slept during most of it.

23 MR. WASSERSTEIN: May I take the opportunity
24 to hand up a note that I drafted with respect to identifi-
25 cation.

A48

1 jpjw
2 THE COURT: I'm afraid not at this point.
3 The jury is standing up to take a stretch. I can hardly
4 rewrite the charge on such a heavy issue as that now.

5 (In open court)

6 THE COURT: The law provides that even if
7 one conspirator joins the conspiracy after it was formed
8 and was engaged in it to a degree more limited than that
9 of other co-conspirators, he is equally culpable so long
10 as he was a co-conspirator. In other words, it is not
11 required that a person be a member of the conspiracy from
12 its very beginning.

13 He may join that at any point during its
14 progress and still be held responsible for all that has
15 been said or done in furtherance of the conspiracy before
16 he even joined it. That is for all that has been said
17 or done in furtherance of the conspiracy before he joined
18 and that may be done or said thereafter during the
19 existence of the conspiracy and in furtherance of it and
20 while he remains a member.

21 It is not required that the government
22 prove that a conspirator knew all the other members of
23 the conspiracy. A conspiracy once formed is presumed to
24 have continued until its objective was accomplished or
25 there is some affirmative act of termination by its members.

AYG

Once you are satisfied beyond a reasonable doubt that a conspiracy existed and that the defendant you are considering was a member of it, any acts and declarations of any person whom you find was also a member of the conspiracy which occurred during the existence of the conspiracy and in furtherance of its objectives are considered the acts and declarations of all other members even though the particular defendant was not present at the time the act was committed or the statement was made as long as the act was done in furtherance of the conspiracy.

In other words, every co-conspirator is fully responsible for whatever other co-conspirator does in furtherance of the conspiracy, whether he knows about it or not and whether he specifically approves of it or not.

Now, we come to the fourth element and final element of the crime of conspiracy.

The offense of conspiracy is complete only when the unlawful agreement is made and after any single overt act to effect the object or purpose of the conspiracy is committed by at least one of the co-conspirators.

An overt act is any step or any action or any conduct which is taken to achieve or accomplish or

A50

further the objective of the conspiracy.

Now, the purpose of requiring proof of an overt act is that while parties might conspire and agree to do something unlawful, they may change their minds or even abandon the project and do nothing to carry it into effect. In which event, it would not be a crime.

Let me read these overt acts to you again.

In furtherance of the conspiracy and to effect the objects thereof, the following overt acts among others were committed within the Southern District of New York. There are three.

One. On or about April 4, 1977, David Campbell, the defendant, entered the Chemical Bank, 543 Cathedral Parkway, New York, New York and threatened persons therein with a shotgun.

Two. On or about April 4, 1977, Wallace Hall, the defendant, entered the bank, the said bank and threatened persons therein with a revolver.

Three. On or about April 4, 1977, Michael Tartt, the defendant, entered the said bank and with the aid of the defendants Campbell and Wallace Hall stole approximately \$19,104.

Now, the prosecution is not required to set forth in the indictment each and every act upon which

A51

2 it relies to establish the conspiracy or a defendant's
3 participation in it.

4 Nor, is it required to prove each overt act
5 which may have occurred during and in furtherance of the
6 conspiracy. But it is required to prove that at least
7 one overt act did take place in the Southern District of
8 New York. I instruct you that Manhattan is in the
9 Southern District of New York.

10 The overt act does not have to be criminal
11 in itself. It may, for example, consist of a meeting
12 among alleged co-conspirators and in connection with the
13 objectives of the conspiracy.

14 The overt act, however, as I have said, must
15 be an act which follows and intends toward the accomplish-
16 ment of a plan or scheme charged in the conspiracy count
17 and must be knowingly done in furtherance of some object-
18 ive or goal of the conspiracy.

19 Here, you know, that the government says
20 the goal of the conspiracy charge was to rob a bank.

21 If you determine that the conspiracy charged
22 in the indictment existed, it is not necessary for the
23 government to prove that the defendant you are considering
24 committed or participated in a particular overt act,
25 since, as I told you a moment ago, the acts of any member

A52

1 of the conspiracy done in furtherance of the conspiracy
2 become the acts of all other members of the conspiracy.
3

4 If you find that the government has failed
5 to establish beyond a reasonable doubt any one of the
6 four elements of the crime of conspiracy as I have just
7 enumerated and discussed them with you, then you must
8 find that the defendant you are considering is not guilty
9 of that charge.

10 On the other hand, if you should find that
11 the government has sustained its burden of proof with
12 respect to each one of these elements in the crime of
13 conspiracy, then you must find that the defendant you are
14 considering is guilty of that count. That is Count 1.

15 Now, let's move on to the remaining two
16 counts. Counts 2 and 3.

17 We call that substantive offenses.

18 The indictment is based upon the Federal
19 Bank Robbery Act, which was passed by the Congress to
20 protect the deposits of banks that are organized or
21 insured under federal laws. This statute defines various
22 crimes related to robbery or theft from such banks.

23 Specifically, the defendants are accused
24 of engaging in a bank robbery of the Chemical Bank located
25 at 543 Cathedral Parkway in Manhattan on April 4, 1977.

A53

1
2 With respect to this robbery, the defendants
3 are charged with two separate violations of law in two
4 different counts.

5 Briefly stated, the crimes charged against
6 the defendants involved, one, robbery of a bank by the
7 use of force and violence or intimidation to take money
8 belonging to a bank. And, two, assault or putting in
9 jeopardy the life of any person by the use of a dangerous
10 weapon during the commission of the alleged bank robbery.

11 The applicable section of federal law reads
12 in pertinent part as follows:

13 "Whoever by force and violence or by
14 intimidation takes from the person or presence of another
15 any property or money or any other things of value belonging
16 to or in the care, custody, control, management or
17 possession of any bank is guilty of a crime."

18 And the federal statute defines the term
19 bank as "Any bank deposits of which are insured by the
20 Federal Deposit Insurance Corporation."

21 Count 2 reads:

22 The grand jury charges on or about April 4,
23 1977 in the Southern District of New York, David Campbell,
24 Wallace Hall and Michael Tartt, the defendants, unlawfully,
25 wilfully and knowingly by force and violence and by

A54

intimidation, did take and attempt to take from the person and presence of others money belonging to and in the care, custody, control, management, possession of the Chemical Bank, 543 Cathedral Parkway, New York, New York, a bank, the deposits of which were insured by the Federal Deposit Insurance Corporation.

In order to sustain a conviction under that count, Count 2, the government must establish beyond a reasonable doubt as to each defendant on trial here the following essential elements:

One. That on or about the date set forth the Chemical Bank at the address I have given you was a bank, the deposits of which were insured by the Federal Deposit Insurance Company.

Now, this has been stipulated to by the attorneys. However, since it is an essential element, you must still make this finding beyond a reasonable doubt.

Two. That on or about the date set forth in Count 2 the defendant you are considering took money that belonged to or was in the care, custody, control, management or possession of the bank or aided and abetted another person to do so. Hold on to those words, aided and abetted, I will have more to say about that in a minute.

Three. That the money was taken from the

A55

person or the presence of one or more persons who were employees of the bank.

Four. That the defendant you are considering accomplished this taking by force and violence or by intimidation.

The words force, violence and intimidation are used in their ordinary sense.

The government is not required to show the force and violence that was actually used against anybody. If it proves beyond a reasonable doubt that the taking was the result of intimidation, that is, was the result of placing one or more persons in fear. Intimidation may be established by proof of circumstances that are normally and reasonably calculated to arouse fear in the ordinary person.

If the proof shows conduct which would normally be expected to generate fear, then it is not necessary for those affected to have actually experienced terror or panic or hysteria.

Here the government relies upon evidence that this was an armed robbery involving the use of a sawed off shotgun and a hand gun, whether it was a pistol or revolver.

The final element is that the defendant you

A56

are considering acted wilfully, that is, his actions were deliberate and purposeful and committed with the specific intent to do that which the law forbids. That is to say, as it is sometimes expressed, with evil motive or bad purpose either to disobey or disregard the law.

Now, let's move on to Count 3.

In order to find either of the defendants guilty of Count 3, the last of the three counts in the indictment, you must find beyond a reasonable doubt that the defendant you are considering committed the bank robbery charged in Count 2.

In addition, you must find beyond a reasonable doubt that the defendants or any one of them, in committing the bank robbery described in Count 2, either assaulted or one or more persons or by the use of a dangerous weapon, a firearm, put in jeopardy the lives of one or more persons.

If, for instance, you were to find that one or both of the defendants is guilty on Count 2 and if you find that the defendant whose guilt you are considering either used a firearm or assisted someone who used a firearm and knew that that person used a firearm, then that defendant is guilty on Count 3 even if he did not himself have a firearm.

A57

Let me read Count 3 to you.

The grand jury charges: On or about April 4, 1977 in the Southern District of New York, David Campbell, Wallace Hall and Michael Tarrt, the defendants, in committing and attempting to commit the offense described in Count 2 above, unlawfully, wilfully and knowingly did assault persons and put in jeopardy the lives of persons by the use of dangerous weapons and devices, to wit, a revolver and a shotgun.

Count 3 requires a finding either that there was an assault or that the lives of one or more persons were placed in jeopardy by the use of a dangerous weapon. It is not essential to find both an assault and an endangering of lives by the use of such weapons.

In considering this, apply the legal definition of the word assault. To wit, an unlawful attempt or threat to apply force and violence, to inflict bodily injury when the attempt or threat is coupled with an apparent present ability to carry it out, such as to arouse fear in the intended threatened victim that he or should would be subject to immediate physical injury.

An assault as it is defined in law may be committed without actually touching or striking or doing bodily harm to the person in question. For example, the

A58

1 flourishing or pointing or showing of a gun or pistol at
2 another person for the purpose of putting that person in
3 fear, is sufficient to constitute an assault.
4

5 As I mentioned, however, even if you find
6 no assault in connection with Count 3, this count may be
7 established if you find that the lives of one or more
8 people were put in jeopardy by the use of a dangerous
9 weapon and to justify such a finding in this case, you
10 must be convinced beyond a reasonable doubt that one of
11 the defendants carried and displayed a firearm.

12 In Counts 2 and 3 the defendants have been
13 charged with violating two sections of federal law which
14 I have discussed.

15 However, the defendants are also charged
16 with violating another federal statute in connection
17 with Counts 2 and 3. That is what is called the aiding
18 and abetting statute. That statute provides in pertinent
19 part as follows:

20 "Whoever commits an offense against the
21 United States or aids, abets, counsels, commands, induces
22 or procures its commission, is punishable as a principal.
23 Whoever wilfully causes an act to be done, which if directly
24 performed by him or another would be an offense against
25 the United States, is punishable as a principal."

A59

Accordingly, you may find a defendant guilty as described in Count 2 or Count 3 or both if you find beyond a reasonable doubt that another person actually committed the offense or offenses and the defendant whose guilt you are considering aided and abetted him.

It is enough if you find that a defendant knowingly associated himself in some manner with the illegal venture. Actually participated in it as something he wished to bring about or that he sought by his actions to make it succeed.

In this connection, you may also consider whether the particular defendant had a stake in the venture. In other words, the law is, that one who aids and abets another or causes another to commit an offense with knowledge of the unlawful nature of the offense is just as guilty of that offense as if he committed the offense himself.

To find a defendant guilty of aiding and abetting, you must find something more than mere knowledge on his part that a crime has been committed or is being committed. Thus, a mere spectator at a crime is not a participant or an aider or abettor.

Consequently, in order to find a defendant guilty as an aider and abettor, you must find that the

A60

particular defendant with knowledge of the unlawful purpose in some way associated himself with the illegal activity, that he knowingly participated in it as something he wished to bring about. That he knowingly by his actions endeavored to make it succeed.

To reiterate, then, the defendants David Campbell and Michael Tarrt have been charged with three separate offenses. Conspiracy to rob a bank, bank robbery and assault during the commission of the bank robbery.

The government has the burden of proving each element of each offense, as to each defendant, as I have just described them to you beyond a reasonable doubt.

If you do not find that the government has done this, then you must return a verdict of not guilty. If you find that the government has met this burden, you are to return a verdict of guilty.

There has been testimony introduced which presents what is known as the defense of alibi. You will recall that Campbell, the defendant, called witnesses who stated that they saw, spoke and transacted business with Campbell in his apartment building or in its vicinity during the time the bank robbery involved here is said to have occurred and that defendant Tarrt testified that he was in and out of his and defendant Campbell's apartment

A61

1 and in the street conducting his business when the
2 robbery occurred.
3

4 This evidence has been introduced to
5 establish an alibi, which amounts to a contention that
6 the defendants were not present at the bank on 110th
7 Street and Cathedral Parkway at the time when or at the
8 place where they are alleged to have committed the offense
9 charged in the indictment.

10 If after considering all of the evidence
11 you have a reasonable doubt as to whether the defendant you
12 are considering was present at the time and place of the
13 alleged events, you must find that defendant not guilty
14 on Counts 2 and 3.

15 As I have instructed you on Count 1, the
16 conspiracy count, the defendant need not have actually
17 been present, need not have actually carried out the goal
18 of the conspiracy in order to have been found out to be
19 a member of the conspiracy, but it is the theory of the
20 government here that the defendants Tarrt and Campbell
21 were actually present in the bank carrying out the robbery.

22 In considering Counts 2 and 3, you must
23 consider evidence regarding the identifications of the
24 defendants charged with being involved in the robbery.

25 You should consider the opportunity of the

AG2

witnesses who testified to observe the robbers during and after the incident in determining the reliability of the witnesses' identification.

You should consider all of the circumstances shown in the evidence which bear on the ability, opportunity and motivation of the witness to make a careful observation and to form and retain a definite image of the bank robbers in his or her mind.

In this connection, you should consider all of the circumstances surrounding the pretrial identification in order to determine the reliability of the witnesses in-court identification of these defendants as the robbers or the lack of their in-court identification of these defendants as the robbers.

You should therefore decide -- and this is the key question -- whether the witness is able to identify the defendants here in court as the robbers because of the image he or she formed from his or her independent observation of the bank robbers at the scene of the crime or whether the witness' identification here was the result of identification procedures which were suggestive and sufficiently so as to give rise to a very substantial likelihood of mistaken identification.

Now, if after considering all of the evidence

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1
2 you have a reasonable doubt whether the defendant you are
3 considering was present at the time and place of the
4 alleged events, you must find that defendant not guilty
5 on Counts 2 and 3.

6 As I instructed you on Count 1, the conspiracy
7 count, the defendant need not have actually carried out
8 the goal of the conspiracy in order to be found to have
9 been a member of a conspiracy.

10 But, again, as I told you, it is the govern-
11 ment's theory that both of these defendants were present
12 in the bank during the robbery and actually carried it
13 out.

14 The question has been raised by the evidence
15 presented as to whether the defendants were in fact the
16 criminal actors as charged in the indictment. This
17 necessitates your resolving any conflicts or uncertainties
18 in testimony on this issue. This burden of proof is on
19 the prosecution with reference to every element of the
20 crimes charged. This burden includes the burden of
21 proving, beyond a reasonable doubt the identity of the
22 defendants as the perpetrators of the crimes charged.

23 This completes my instruction to you on the
24 specific counts involved in this case. I have only a few
25 other general instructions to give you before you begin

ALY

1 jpjw

2 your deliberations.

3 Let me move through them quickly.

4 I have described the charges contained in
5 each of the three counts in the indictment which have
6 been brought against the defendants Campbell and Tartt.

7 I have outlined the essential elements
8 with respect to these charges. You should note once
9 again that a separate crime or offense is charged in
10 each of the three counts of the indictment. Each charge
11 against each defendant, the evidence pertaining to it,
12 should be considered separately. The fact that you find
13 a defendant guilty or not guilty as to one of the offenses
14 charged should not control your verdict as to the other
15 offenses charged.

16 Likewise, the fact that you find one
17 defendant guilty or not guilty as to any particular
18 charge, should not control your verdict as to the other
19 defendant.

20 The most important part of this case is the
21 part which you are now, as jurors, are about to play
22 because it is you who will have to decide whether the
23 defendants are guilty or not guilty of these charges.

24 Now, I know you will try the issues that
25 have been presented to you in accordance with the oath

ALG

1 jpjw
2 that you have taken as jurors. You will recall that
3 in that oath you promised that you would well and truly
4 try the issues joined in this case and a true verdict
5 render. If you follow that oath and if you try the
6 issues without confusing your thinking with emotions,
7 you will arrive at a just verdict.

8 Now, as you deliberate, please be careful
9 to listen to the opinions of other jurors as well as to
10 ask for an opportunity to express your own views. No one
11 juror holds the center of the stage in the jury room. No
12 one juror controls or monopolizes deliberations. You must
13 all express your views and exchange views.

14 If you become convinced that your original
15 view was wrong with respect to any matter, don't be afraid
16 to change your vote because of pride in your original
17 opinion or a reaction to the stubbornness to another
18 person.

19 On the other hand, do not surrender your
20 honest beliefs solely because of the opinion of your
21 fellow jurors or because you are outnumbered.

22 Understand of course that in a criminal
23 case in this court your verdict on each count must be
24 unanimous. That is, it must be joined in by each and
25 every one of you. The form of the verdict as to each

ALC6

defendant will be either guilty or not guilty on each count of the indictment that is before you.

During your deliberations, you may send for any exhibits in evidence that you wish to see or that you wish to have. You may request that any testimony be read back to you. If you ask for testimony to be read back to you, it will be extremely helpful if you can let us know with as much particularity what it is you want. Then it can be searched out and presented to you. You may request any portion of this charge to be read back to you.

Now, essentially the charge has been divided into three parts. The first part described your responsibilities, what you could and could not consider, reasonable doubt, credibility, several other matters.

The second part discussed those elements that I told you had to be proved and the third part are these general instructions. To the extent you want any portion of this charge to be reread, try to give us with as much particularity as possible what it is that you want.

You are not going to have to request that an indictment be sent into the jury room because I am sending one in as soon as you begin your deliberations.

Please remember, once again, an indictment

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is not evidence but merely an accusation.

All of your requests must be in writing and should be signed by the forelady.

You are not to consider in any way or speculate about the sentence which a defendant may receive if found guilty. It is the function of the jury to deliberate and determine whether a defendant is or is not guilty on the basis of the evidence and the instruction of the Court. It is the function of the Judge to determine the disposition of the defendant's case thereafter.

Finally, you are instructed that you must not reveal the standing of the jurors at any time during your deliberations. That is, you are not to indicate the split of any vote on any count for any verdict to anyone including the Court.

Now, have your luncheon orders been taken?

They will be taken shortly. I am going to ask you to step out for just a few minutes while I confer with counsel. We will be very likely calling you back very shortly. Do not begin your deliberations yet.

Madam Forelady, lead the jury out.

(Jury left the courtroom)

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THE COURT: Exceptions, counsel?

MR. WASSERSTEIN: Your Honor, with respect to your Honor's charge, I would have three exceptions.

One would be to your Honor's charging as you stated that you would charge with respect to the striking of the testimony with respect to marijuana.

The second exception would be to the highlighting of the importance of the conflict between Mr. Tarrt's testimony and alleged statement to Martinolich. In the juxtaposition of your Honor's charge, that was immediately followed by inconsistent statements, credibility and false statements, disregarding the entire testimony.

Instead of using Wallace Hall's testimony as material breaches of a prior statement, you then went into Wallace Hall. So, I think in the juxtaposition, it sort of highlights that one inconsistent statement.

I would object to your Honor's -- simply the breadth of the conspiracy charge, the number of words used in that.

THE COURT: I will join in that. I would like to see one that is about two pages long that would satisfy the Court of Appeals. In fact, maybe we can get Mr. Iason's office to work on that. Two-page conspiracy

A69

instruction, Mr. Iason, simply stating principles that the Court of Appeals would find suitable and satisfactory.

MR. IASON: Yes, sir.

THE COURT: I guess you would like it too.

MR. IASON: Yes, very much.

THE COURT: I have spent six years trying to get a conspiracy charge down to bare bones and I have just about given up. I finally yielded to the government's submissions on this one.

Mr. Naden.

MR. NADEN: It seems to be a pattern, your Honor, of the government's persistence.

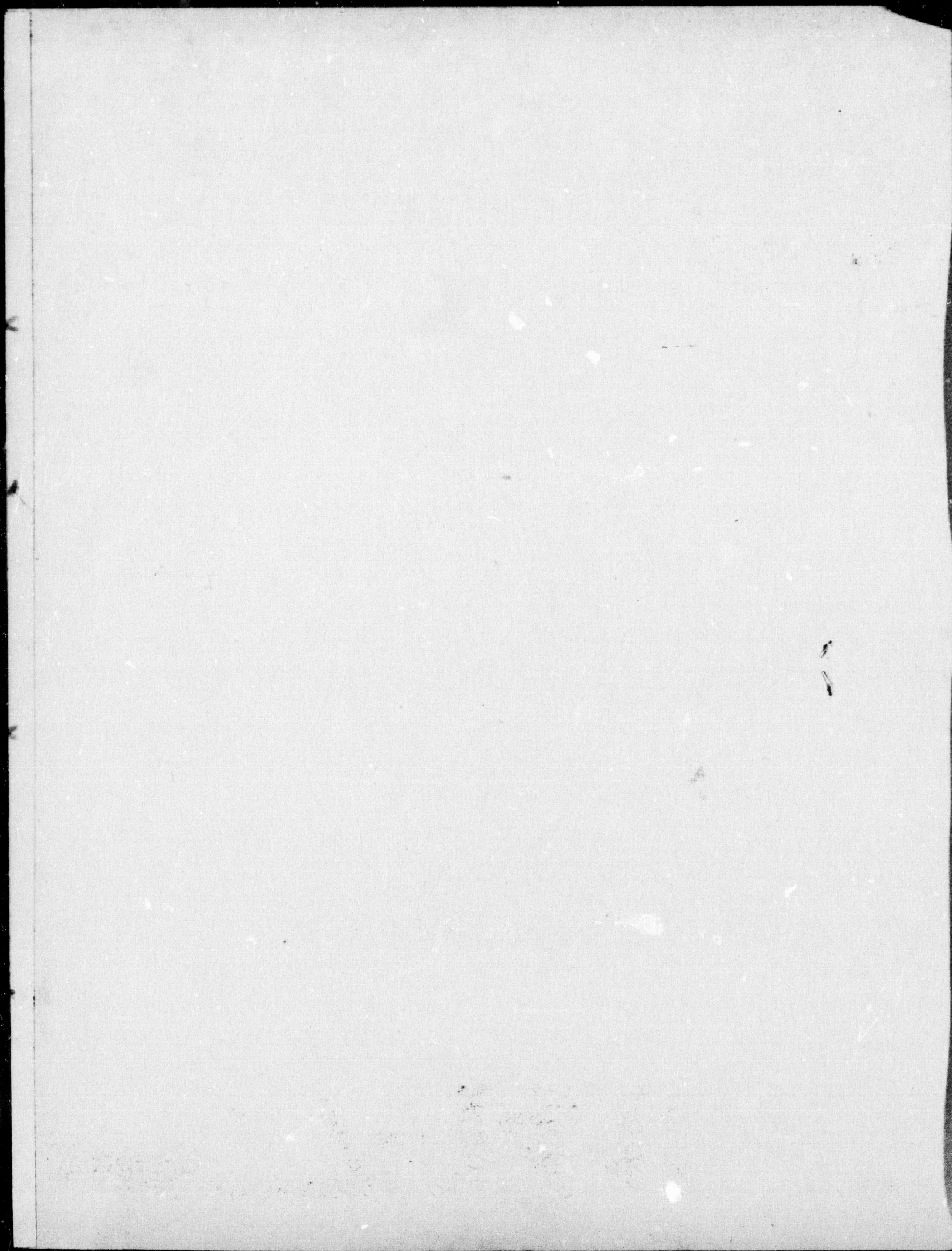
THE COURT: Well, that's their job.

MR. NADEN: I don't say that critically.

Number one, the Court charged the jury about knowledge of a criminal conspiracy or association with criminal actors, not being sufficient to justify a conviction. I want to except to that.

I would request a supplement to that charge and that the mere presence at the scene of a crime or at the scene of conversations which are alleged to be a part of conspiratorial activity on the part of some is not sufficient to establish membership in a

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COURT OF APPEALS
SECOND CIRCUIT

UNITED STATES OF AMERICA,

~~Deponent~~
Respondent.
- against -

MICHAEL TART & DAVID CAMPBELL,

Appellants.

Index No.

Affidavit of Personal Service

STATE OF NEW YORK, COUNTY OF

ss.:

I, Reuben A. Shearer, being duly sworn, depose and say that deponent is not a party to the action, is over 18 years of age and resides at 211 West 144th Street, New York, New York 10030.

That on the 12th day of Dec. 19 77 at 1 St Andrews Plaza
New York, N.Y.

deponent served the annexed

Appendix

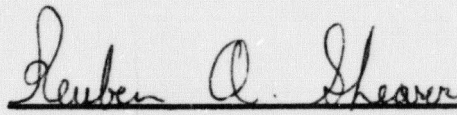
Brief

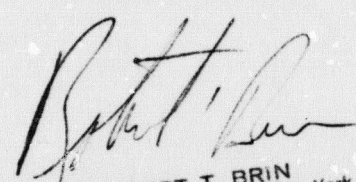
Robert J. Fiske, Jr.

upon

the in this action by delivering a true copy thereof to said individual personally. Deponent knew the person so served to be the person mentioned and described in said papers as the herein,

Sworn to before me, this 12th
day of Dec. 19 77


Reuben A. Shearer


ROBERT T. BRIN
NOTARY PUBLIC, State of New York
No. 31-0418950
Qualified in New York County
Commission Expires March 30, 1979